Supreme Court, U.S.
FILED
JUN 26 1992
OFFICE OF THE CLERK

(2)

No. 91-1913

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

State of Ohio,
Petitioner,

v.

Kevin L. DeMuth,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SIXTH DISTRICT COURT OF APPEALS
OF THE STATE OF OHIO

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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Note: The Question Presented for Review, List of Parties, Opinions of the Courts Below, Statement of Jurisdiction, and Statutes Involved have been omitted from this brief pursuant to Rule 24.2 of the Revised Rules of the Supreme Court of the United States.

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STATEMENT OF THE CASE

As noted in petitioner's Statement of the Case, this case arises out of an automobile accident which occurred at approximately 3:30 a.m., August 5, 1989 in Erie County, Ohio. The accident took place when an automobile operated by respondent left the road on a curve and struck a tree. The accident caused respondent to sustain serious personal injuries and took the life of passenger, Michael Graves.

On January 17, 1990, an indictment was filed with the Court of Common Pleas for Erie County charging respondent with aggravated vehicular homicide[1] (count one), and involuntary manslaughter[2]

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[1]OHIO REV. CODE ANN. § 2903.06(A) (Anderson Supp. 1991).

[2]OHIO REV. CODE ANN. § 2903.04(B) (Anderson 1987).

(count two), for the death of Michael Graves. Specifically, the indictment charged respondent as follows:

COUNT ONE

"THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that on or about the 5th day of August, 1989, in Erie County, Ohio, Kevin DeMuth did recklessly cause the death of Michael R. Graves while the said Kevin DeMuth was operating a motor vehicle, in violation of Ohio Revised Code, Section 2903.06, a (F-4), and against the peace and dignity of the State of Ohio.

COUNT TWO

That on or about the 5th day of August, 1989, in Erie County, Ohio, Kevin DeMuth did recklessly cause the death of Michael R. Graves as a proximate result of his committing a misdemeanor: to wit ORC 4511.19, Driving Under the Influence, all in violation of Ohio Revised Code, Section 2903.04(B), a (AF-3), and

against the peace and dignity of the State of Ohio."

Trial on these two counts began on April 2, 1990. At trial, to establish that respondent recklessly caused the death of Michael Graves while operating an automobile (count one), petitioner attempted to prove that respondent was driving under the influence of alcohol at the time of the accident.[3] Likewise, to establish that respondent proximately caused the death of Michael Graves during the commission of a misdemeanor (count two), petitioner attempted to prove that respondent was driving under the

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[3]Evidence that a defendant was driving while under the influence of alcohol is sufficient to support a finding of recklessness as a matter of Ohio law. State v. Runnels, 56 Ohio App. 3d 120, 565 N.E.2d 610 (1989); State v. Kavlich, 33 Ohio App. 3d, 515 N.E.2d 652 (1986); State v. Stinson, 21 Ohio App. 3d 14, 486 N.E.2d 831 (1984).

influence of alcohol at the time of the accident. Thus, the issue of whether respondent was driving while under the influence of alcohol at the time of the accident was elemental to both counts of the indictment.

Contrary to the insinuations of the Petition for Writ of Certiorari, at no time was there ever a finding that respondent was driving while under the influence of alcohol at the time of the accident. The facts relevant to this issue which were presented at trial are briefly set forth in the paragraphs below.

At 5:34 a.m. on August 5, 1989, while respondent was at Providence Hospital receiving treatment for the injuries which he sustained as a result

of the accident, a sample of his blood was withdrawn at the direction of State Trooper David Cope. (TR 83). Upon analysis of this blood sample it was determined that, at the time the blood sample was taken, respondent's blood alcohol level was 0.12 percent grams alcohol per 100 milliliters of blood. (TR 153).[4].

Respondent established that it was more probable than not that respondent's blood sample was taken in excess of two hours after the time when the accident occurred. The affidavit of Thomas Baumer, who was the nearby neighbor who

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[4]A person is presumed to be driving under the influence of alcohol in violation of Ohio law if a person has a concentration of ten-hundredths of one percent by weight of alcohol in his blood. OHIO REV. CODE ANN. § 4511.19(A)(2) (Anderson Supp. 1991).

heard and reported the accident, established the time of the accident and therefore made it clear that the blood sample was taken approximately two hours and eight minutes after the accident. (See Affidavit of Thomas Baumer, which is part of the appellate record).

The fact that respondent's blood was not withdrawn within a two hour period following the accident has legal significance. Evidence of a defendant's blood alcohol concentration is not admissible at trial to prove driving under the influence of alcohol if the defendant's blood sample is withdrawn more than two hours after the alleged violation.[5]

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[5]OHIO REV. CODE ANN. § 4511.19(D) (Anderson Supp. 1991).

The Trial Court ruled that whether the respondent's blood was withdrawn within the two hour limit was an issue of fact for the jury and permitted evidence relating to the respondent's blood alcohol concentration to be admitted in evidence. (TR 135-136). The jury was instructed that, in essence, it was to determine whether the blood was drawn within two hours from the time of the accident, and if so, it was to apply a presumption that the respondent was driving under the influence of alcohol at the time of the alleged criminal violation. (TR 411).

During the course of trial, notwithstanding the evidence relating to respondent's blood alcohol level, there was testimony which suggested that respondent was not impaired or under the

influence of alcohol at the time of the accident. Witnesses testified that respondent exhibited a substantial degree of mental awareness immediately after the accident, notwithstanding the magnitude of the accident. For example, respondent was able to follow Trooper Cope's directions at the accident scene. (TR 133). Moreover, persons who were at the scene testified that respondent was responsive to their questions and was generally cooperative and not combative. (TR 115-116; 249).

Respondent testified that the accident occurred because he fell asleep behind the wheel. (TR 361). The evidence showed that, at the time of the accident, respondent had been awake for approximately twenty-four consecutive hours, since very early on Friday morning

when he awoke to get ready for work. (TR 344).

On April 9, 1990, the jury returned a not guilty verdict on count one, aggravated vehicular homicide, but could not reach a decision on count two, involuntary manslaughter. Based on the jury's verdict, the Trial Court entered judgment of acquittal on the aggravated vehicular homicide count and subsequently dismissed the involuntary manslaughter count on grounds that re-trial would subject respondent to double jeopardy.

The Trial Court's ruling on this matter was affirmed after review by the Ohio Sixth District Court of Appeals. State v. DeMuth, No. E-90-51 (Sixth Ohio Ct. App. Nov. 1, 1991). Petitioner now seeks this Honorable Court's review of

the decision via Petition for Writ of Certiorari to the Sixth District Court of Appeals of the State of Ohio.

SUMMARY OF THE ARGUMENTS

The Supreme Court of the United States lacks jurisdiction over the instant case. This case turns on the interpretation of Ohio statutory criminal law, not on the interpretation of federal law or the Double Jeopardy Clause contained in the Fifth Amendment of the United States Constitution.

Furthermore, the courts correctly determined that re-trial of respondent on the charge of involuntary manslaughter after his acquittal on the charge of aggravated vehicular homicide would violate the double jeopardy proscription

of the United States and Ohio Constitutions. Respondent has already been through the ordeal of one trial which ended in a valid and final judgment of acquittal on the charge of aggravated vehicular homicide. If respondent is forced to undergo a second trial on the charge of involuntary manslaughter, the alleged conduct for which respondent was acquitted in the first trial will unconstitutionally be at issue once again in the second trial.

ARGUMENTS

I. THE SUPREME COURT OF THE UNITED STATES LACKS JURISDICTION OVER THIS MATTER BECAUSE THERE ARE NO SUBSTANTIAL CONSTITUTIONAL QUESTIONS INVOLVED.

Resolution of this case does not turn on an interpretation of federal law or the U.S. Constitution, but rather on

an interpretation of Ohio statutory criminal law. The Ohio Supreme Court dismissed petitioner's appeal *sua sponte* for the reason that no substantial constitutional questions exist in this case. State of Ohio v. DeMuth, 63 Ohio St. 3d 1416 (1992) (appeal dismissed *sua sponte*). Respondent respectfully submits that since no substantial constitutional or federal questions are involved in this case, the United States Supreme Court lacks jurisdiction over this matter of wholly state law.

Petitioner does not seek review of an Ohio court's interpretation of the Double Jeopardy Clause contained in the Fifth Amendment of the United States Constitution. On the contrary, Petitioner seeks review of the Ohio courts' determination that Ohio's

aggravated vehicular homicide and involuntary manslaughter statutes are substantially similar in circumstances where the defendant is accused of driving while under the influence of alcohol proximately causing the death of another.

Ohio courts have determined that Ohio's aggravated vehicular homicide and involuntary manslaughter statutes are allied offenses of similar import in cases where a defendant is accused of driving while under the influence of alcohol proximately causing the death of another in an automobile accident.

> "R.C. 2903.06, aggravated vehicular homicide requires the reckless operation of a motor vehicle resulting in the death of another. Consequently, the defendant must be recklessly operating his vehicle, which is of itself a misdemeanor. Thus, a violation of R.C. 2903.06 will of necessity result in the violation of R.C. 2903.04(B),

> involuntary manslaughter. Consequently, we conclude the two crimes are of similar import." State v. Davis, 13 Ohio App. 3d 265, 270, 469 N.E.2d 83, 88 (1983).

In so holding, the Ohio courts have ruled that the statutes are too similar to permit sentencing a defendant on both statutes when the violation stems from a single instance of conduct. State v. Chippendale, 52 Ohio St. 3d 118, 556 N.E.2d 1134 (1990); State v. Torres, 31 Ohio App. 3d 118, 508 N.E.2d 970 (1986).

The Trial Court in the instant case did rule that a re-trial of respondent would violate the constitutional proscription against double jeopardy, but the decision was premised on prior Ohio court determinations that Ohio's aggravated vehicular homicide and involuntary manslaughter statutes were

allied offenses of similar import. Because this case turns on the interpretation of state law and not on the constitution, respondent respectfully submits that this Honorable Court lacks jurisdiction.

II. THE TRIAL COURT PROPERLY DISMISSED THE INVOLUNTARY MANSLAUGHTER INDICTMENT AGAINST RESPONDENT BECAUSE RE-TRIAL WOULD VIOLATE RESPONDENT'S RIGHTS UNDER THE OHIO AND UNITED STATES CONSTITUTIONS.

Re-trial of respondent on the count of involuntary manslaughter would violate respondent's rights under the United States Constitution and under the Ohio Constitution. The United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. AMEND. V. Similarly,

the Ohio Constitution provides that "no person shall be twice put in jeopardy for the same offense." OHIO CONST. ART. I § 10.

To determine whether a subsequent state criminal prosecution is barred by the guarantee against double jeopardy, a court must first apply the test set forth in Blockburger v. United States, 284 U.S. 299 (1932). If application of the Blockburger test reveals that the two offenses have identical statutory elements or that one is a lesser included offense of the other, then the inquiry must cease, and the subsequent prosecution is barred.

> "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an

additional fact which the other does not." Blockburger, 284 U.S. 299, 304.

Applying the Blockburger test to the instant case, each statute requires proof of an additional fact which the other does not. For example, to convict a defendant of aggravated vehicular homicide, the prosecution must prove reckless operation of a motor vehicle by the defendant proximately causing the death of another. OHIO REV. CODE ANN. § 2903.06(A) (Anderson Supp. 1991). But to convict a defendant of involuntary manslaughter, the prosecution must prove that death was proximately caused as a result of a defendant's commission of a misdemeanor. OHIO REV. CODE ANN. § 2903.04(B) (Anderson 1987).

Therefore, in the case *sub judice*, a technical comparison of the elements of

the two offenses as required by the Blockburger test reveals that the offenses do not have identical statutory elements. This is petitioner's sole argument in support of its contention that respondent should be forced to endure re-trial on the involuntary manslaughter count.

Contrary to the assertions of petitioner, a strict application of the Blockburger test is not the exclusive means of determining whether a subsequent prosecution violates the Double Jeopardy Clause. See, e.g. Harris v. Oklahoma, 433 U.S. 682 (1977).

> "The Blockburger test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences,

> successive prosecutions will be barred in some circumstances where the second prosecution requires relitigation of factual issues already resolved by the first." Brown v. Ohio, 432 U.S. 161, 166-167 n.6 (1977).

For example, in Illinois v. Vitale, 447 U.S. 410 (1980), the defendant allegedly caused a fatal automobile accident. The defendant was prosecuted for failing to reduce speed to avoid an accident in violation of Illinois law. The day after his conviction on that offense, the State charged the defendant with two counts of involuntary manslaughter. This Honorable Court held that the second prosecution for manslaughter was not barred under the traditional Blockburger test because each offense required proof of a fact which

the other did not. However, the Court went on to hold that:

> "In any event, it may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on such conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under Brown and our later decision in Harris v. Oklahoma, 433 U.S. 682 (1977)." Vitale, 447 U.S. at 420.

The double jeopardy prohibition against subsequent prosecutions is also applicable in situations where a state seeks to prosecute a defendant on an offense based on the same conduct which the defendant has already been acquitted. Ashe v. Swenson, 397 U.S. 436 (1970).

Most recently, in Grady v. Corbin, ___ U.S. ___, 110 S. Ct. 2084 (1990), this Court held that a subsequent prosecution must do more than merely survive the Blockburger test.

> "As we suggested in Vitale, the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense which the defendant has already been prosecuted. This is not an 'actual evidence' or 'same evidence' test. The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct." Grady, 495 U.S. ___, 110 S. Ct. at 2093.

Returning to the instant case, petitioner wants a second trial of respondent on the charge of involuntary manslaughter. To convict respondent of involuntary manslaughter in a second trial, petitioner would have to prove

that respondent did "... recklessly cause the death of Michael R. Graves as a proximate result of his committing a misdemeanor: to wit ORC 4511.19, Driving Under the Influence... ." (Jan. 17, 1990 Indictment of Kevin DeMuth, Count Two). The alleged conduct for which respondent would be prosecuted in a second trial, therefore, is driving under the influence of alcohol proximately causing the death of another. This is precisely the same conduct for which respondent was prosecuted and acquitted of in the first trial.

Under Ohio law, to convict respondent of aggravated vehicular homicide, petitioner had to prove that respondent recklessly caused the death of Michael Graves while operating a motor vehicle. OHIO REV. CODE ANN. 2903.06(A)

(Anderson Supp. 1991). The only evidence presented by petitioner to establish that respondent's conduct was reckless was evidence tending to show that respondent was driving under the influence of alcohol at the time of the accident.[6]

Respondent was found not guilty of aggravated vehicular homicide by the jury in the first trial. Thus, an ultimate issue of fact, specifically that

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[6]It is impossible to accurately cite to the trial transcript on this point because petitioner's entire case in chief, hence the majority of trial, was spent trying to prove the allegation that respondent was driving while under the influence of alcohol at the time of the accident. The Court is encouraged to read the trial transcript of petitioner's case in chief because it demonstrates that in a re-trial of respondent on the charge of involuntary manslaughter, petitioner would present evidence attempting to prove precisely the same alleged conduct which respondent was acquitted of in the first trial.

respondent did not recklessly cause the death of Michael Graves while operating a motor vehicle, was determined by a valid and final judgment. Re-trial of respondent on the charge of involuntary manslaughter would necessarily require re-trial of the issues of ultimate fact presented during the first trial.[7]

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[7]In order to reach the not guilty verdict, the jury necessarily had to conclude that respondent's conduct leading to the accident was not reckless. Since driving under the influence of alcohol is reckless conduct *per se* in Ohio, one could reasonably conclude that the jury found respondent not guilty of driving while under the influence of alcohol. Although drawing such an inference is not crucial to resolve this matter in favor of respondent, such an inference supports respondent's claim of double jeopardy under a theory of collateral estoppel. When an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Ashe, 397 U.S. at 443.

As noted by this Court, successive prosecutions following acquittals or convictions raise concerns that extend beyond merely that a defendant may be subjected to an enhanced sentence. Grady, ___ U.S. at ___, 110 S. Ct. at 2091. Multiple prosecutions give the State an opportunity to rehearse its presentation of proof, thus increasing the risk of an erroneous conviction for the offenses charged. Grady, ___ U.S. at ___, 110 S. Ct. at 2091-2092.

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuous state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he

may be found guilty. Green v. United States, 355 U.S. 184, 187-188 (1957).

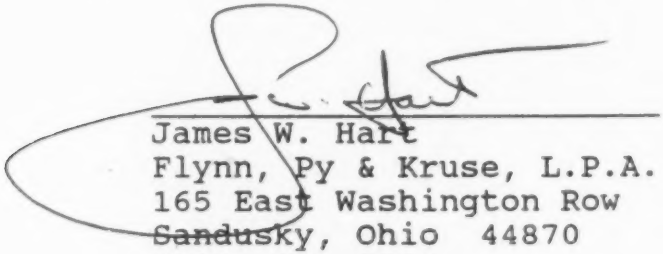
To make respondent run the gauntlet of a second trial based on an issue of conduct already litigated and reduced to a valid and final judgment would place respondent in double jeopardy. Therefore respondent submits that the Ohio courts were correct in holding that re-trial of the involuntary manslaughter charge would violate respondent's rights under the Fifth Amendment of the United States Constitution and under Section 10, Article I of the Ohio Constitution.

CONCLUSION

For the reasons set forth above, respondent respectfully requests this

Honorable Court to deny the Petition for Writ of Certiorari in this case.

Respectfully submitted,



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